FLOYD AND CORWIN SILVA

IBLA 80-15 Decided January 8, 1980

Appeal from a decision of Administrative Law Judge John R. Rampton, Jr., granting a motion to dismiss an appeal from a decision of the Shoshone District Manager. Idaho 5-79-1.

Affirmed.

1. Grazing Permits and Licenses: Cancellation or Reduction -- Rules of Practice: Appeals: Motions

A motion to dismiss an appeal from a decision of the District Manager is properly granted pursuant to 43 CFR 4.470 where the arguments set forth by an applicant for a grazing license or permit are immaterial to the issue of whether the applicant has previously made substantial use of his grazing privileges.

APPEARANCES: Floyd and Corwin Silva, pro sese.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Floyd and Corwin Silva appeal from a decision of Administrative Law Judge John R. Rampton, Jr., dated August 27, 1979, granting the Government's motion to dismiss their appeal from a decision of the Shoshone District Manager. By notice of proposed decision of May 9, 1979, the Shoshone District Manager cancelled appellants' grazing preference in its entirety for failure to make substantial use of their grazing privileges. 1/

The District Manager employed the "substantial use" standard relying upon this Board's holding in Floyd and Corwin Silva, 20 IBLA

1/ This notice of proposed decision became final upon appellants' failure to protest the proposed decision. 43 CFR 4160.3.

237 (1975). 2/ Therein, this Board affirmed a decision of Administrative Law Judge Harvey C. Sweitzer to require appellants to make "substantial active use" of their grazing privileges within 2 years or suffer revocation of their base property qualifications. Because an appeal to this Board suspended BLM's decision pending appeal, appellants had until May 15, 1977, to show substantial active use of their grazing privileges. Some 18 days prior to the end of this 2-year period, i.e., on April 27, 1977, appellants filed an application for cattle use in the Notch Butte Allotment and for sheep use in the Wild Horse Unit. The rejection of this application by the District Manager and the subsequent grant by Administrative Law Judge John R. Rampton, Jr., of the Government's motion to dismiss the Silvas' appeal from the District Manager's decision place this case before the Board for a second time, albeit in a somewhat different posture. 3/

The Government moved to dismiss the Silvas' appeal, because the issues set forth therein were immaterial. 4/ The issue before the District Manager and Judge Rampton was whether the Silvas had made substantial use of their grazing privileges within the 2-year period from May 15, 1975, through May 15, 1977. Appellants in their statement of reasons before Judge Rampton and before this Board renew the argument which they made before Administrative Law Judge Sweitzer that continued nonuse of the subject lands is necessary to rehabilitate the range. This factual issue, however, has been found contrary to appellants' views. In Silva, supra at 239, this Board said: "Appellants'

2/ This case involved an appeal by the Silvas from a decision of Administrative Law Judge Harvey C. Sweitzer. Judge Sweitzer had affirmed a decision of the Shoshone District Manager denying the Silvas' application for total nonuse of their grazing privileges. The Board's decision was dated May 15, 1975.
3/ Prior to the District Manager's notice of proposed decision of May 9, 1979, the District Manager, on May 3, 1977, rejected appellants' application of April 27, 1977, for grazing in the Notch Butte Allotment and in the Wild Horse Unit. This earlier decision of the District Manager was appealed to Judge Rampton who vacated it by a decision dated March 27, 1979. Judge Rampton did so because the District Manager appeared to interpret our decision in Silva, supra, as depriving him of the discretion vested in him by 43 CFR 4115.2-1(e)(10) (1976), now reflected in 43 CFR 4170.1-2 (1978).
4/ The Government's motion to dismiss is authorized by 43 CFR 4.470(d). This motion will lie to dismiss an appeal because "it is frivolous, the appeal was filed late, the errors are not clearly and concisely stated, the issues are immaterial, the issue or issues were included in a prior final decision from which no timely appeal was made, or all issues involved therein have been previously adjudicated in an appeal involving the same privileges, the same parties or their predecessors in interest."

contention that their continued nonuse is necessary to good range conservation practice was not sustained by evidence adduced at the hearing, nor was there any showing that such nonuse was dictated by considerations of animal health or other cogent factors." Appellants' nonuse of the subject lands during the period since Judge Sweitzer's finding has likely improved the forage thereon. No facts have been adduced by appellants to alter Judge Sweitzer's finding that continued nonuse is unnecessary.

Appellants also argued before Judge Rampton that previously reduced AUM's should be restored to appellants before active use of the subject lands is ordered. While this argument is plausible, it is immaterial to the issue of whether appellants have in fact made substantial use of their grazing privileges during the 2-year period at issue. A similar objection may be sustained to appellants' charge that "[t]he Judge's decisions have been unclear as to when use was to be made." Appellants could have resolved any doubt which they may have had by submitting an application for grazing use to the District Manager.

Similar arguments are made to this Board. In addition, appellants point out that a study of the Bennett Hills unit calls for a 35 percent cut in grazing use. The Salmon Challis District is also cited as a site of severe cuts in grazing use.

We agree with Judge Rampton's grant of the Government's motion to dismiss. The bulk of appellants' arguments are immaterial to the issue of whether they made substantial use of their grazing privileges during the critical 2-year period. Appellants' argument that the range cannot support substantial use has been found below to the contrary, and no reason appears to disturb this finding.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Douglas E. Henriques
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Joan B. Thompson
Administrative Judge